

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-7341

**United States Court of Appeals
For the Second Circuit**

CLYDE C. CUTNER, Individually and on Behalf
of All Others Similarly Situated,

Plaintiff-Appellant,

against

ALBERT FRIED, JR., ALBERT FRIED & CO., and
THE NEW YORK STOCK EXCHANGE, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE
SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF PLAINTIFF-APPELLANT
CLYDE C. CUTNER**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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CLYDE C. CUTNER, Individually and on :
Behalf of All Others Similarly Situated, :
Plaintiff-Appellant, : DOCKET NO. 76-7341
-against- :
ALBERT FRIED, JR., ALBERT FRIED & CO., :
and THE NEW YORK STOCK EXCHANGE, INC., :
Defendants-Appellees, :
- - - - -X

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court abuse its discretion in treating plaintiff's failure to make a timely filing of an amended complaint as an occasion for dismissing the action with prejudice for lack of prosecution when:

(a) plaintiff's counsel had received primary responsibility for conduct of the litigation approximately three months before the Court ordered the amended complaint to be filed;

(b) the record showed recent pre-trial activities by plaintiff;

(c) a previous two-day delay in meeting a Court-imposed deadline resulted from failure of plaintiff's counsel to receive notice of the Court's order despite affirmative efforts by plaintiff's counsel to assure that such notice would be received;

(d) the amendment to the complaint involved did not affect the merits or the progress of the litigation, since it simply deleted class action allegations subsequent to a court decision decertifying the action as a class action;

(e) the District Court found no prejudice to defendants from the delay in filing the amended complaint?

2. In light of the heavy emphasis by the District Court on what it considered to be a history of delay in the litigation, should the District Court's opinion and order be construed to dismiss the action solely for failure to make a timely filing of the amended complaint, if dismissal for lack of prosecution is held to have been an abuse of discretion?

3. If the answer to the issue stated in paragraph 2 above is in the affirmative, were the District Court's denial of plaintiff's motion for permission to make a late filing of the amended complaint and the District Court's dismissal of the action solely for failure to meet the twenty-day deadline on filing the amended complaint abuses of discretion in light of considerations described in paragraph 1 above?

PRELIMINARY STATEMENT

This is an appeal from an Order of the Honorable Lloyd F. MacMahon dated June 18, 1976 which denied plaintiff-

appellant's motion for an order permitting a late filing of an amended complaint and dismissed the action with prejudice for failure to prosecute and for failure to comply with a prior Court order which required the filing of such amended complaint within twenty days. Judge MacMahon's opinion appears at pages 122a-130a of the Joint Appendix and has not to appellant's knowledge been reported.

STATEMENT OF THE CASE

(a) Nature of the Case and Course of Proceedings

In January 1973 plaintiff-appellant Clyde C. Cutner ("Cutner") commenced this action for damages sustained by Cutner in connection with a suspension in the trading of Skyline Corporation ("Skyline") common stock on The New York Stock Exchange ("NYSE") on December 22, 1972.* On such date, defendant-appellee Albert Fried, Jr. ("Fried"), an employee of defendant-appellee Albert Fried & Co. ("Fried & Co."), was a registered specialist on the NYSE with respect to trading in Skyline common stock, and it is alleged that in such capacity Fried was authorized and required to act in a manner aimed at providing reasonable price continuity in transactions of Skyline stock by evening out temporary disparities between public supply and demand (e.g., 9a - 10a). At 12:11 P.M. on December 22, 1972--

*The complaint is set forth at pages 8a - 21a.

a few minutes after the publication of a Skyline quarterly earnings report -- Fried and the NYSE, in collaboration with each other and in their respective official capacities, suspended further trading in Skyline shares. Defendants-appellees ("defendants") did not allow trading to resume until 1:10 P.M. on December 26, 1972, at which time they authorized a resumption of trading in Skyline shares at a price approximately \$14 per share below the price at which it had previously been trading. (13a - 14a; 16a).

The complaint alleges that the suspension of trading was materially misleading, inter alia, in that it impliedly represented that an influx of sell orders had been received in such a volume as to require closing the market and that the value of Skyline shares had been substantially reduced as a result of the earnings report (15a - 17a). It is also alleged that the resumption of trading at \$34 per share was materially misleading because it incorrectly implied that \$34 per share was the highest price obtainable by sellers (16a - 17a), that the market had had sufficient time to absorb, assess and recover from the implications and representations made by defendants in stopping trading (16a), and that the specialist had properly fulfilled his responsibility to participate in the market so as to avoid unnecessary price disruptions (17a).

The complaint alleges violations of Sections 10(b) and 11(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and §78k(b) respectively, Rules 10b-5 and 11b-1 promulgated thereunder, and Rule 104 of the NYSE. Count IV of the complaint further alleged that the NYSE had failed and refused to establish adequate rules to govern its specialists as mandated by Rule 11b-1(a)(2).*

At the time trading was suspended, Cutner was the beneficial owner of 4100 shares of Skyline common stock (9a), and in his answers to interrogatories Cutner has set forth his basis for a damage claim of approximately \$100,000.00. See Plaintiff's Answers and Objections to Interrogatories Propounded by Defendants Albert Fried, Jr. and Albert Fried & Co. (document number 19 in Record on Appeal), paragraphs 1, 24, 25, 26, 27(B). In addition to suing on his own behalf, Cutner brought suit on behalf of a class consisting of all persons other than defendants who owned Skyline shares at the time trading was stopped and who suffered damage as a result thereof (11a - 13a).

Defendants answered, denying liability (22a - 30a), and pre-trial trial discovery commenced. Cutner served interrogatories and document production requests upon defendants in March 1973 and in April 1973 moved for an order certifying the litigation as a class action. Defendants opposed the motion for class certification and moved to dismiss

* Count V alleged a pendent claim for negligence.

Courts IV and V of the complaint. On March 13, 1974, Judge MacMahon granted Cutner's motion to certify the case as a class action and dismissed Count IV of the complaint and so much of Count V as alleged negligence in failing to promulgate adequate rules. Cutner v. Fried, 373 F. Supp. 4 (S.D.N.Y. 1974). On April 12, 1974 defendants appealed the order granting class certification, but withdrew the appeal in July 1974. On April 8, 1974 the Court approved a form of class notice and ordered Cutner to submit recommendations regarding the method of identifying and notifying class members (44a).

In July 1975 defendants moved for an order decertifying the action on the ground that Cutner had not taken steps to complete the process of notifying the class and had failed to prosecute the action diligently on the merits (31a - 56a). That motion was denied in a memorandum decision dated September 29, 1975 on condition that Cutner take steps to diligently prosecute the action within 30 days (69a). As described in detail below, counsel for Cutner did not learn of such decision until October 31, 1975, on which date counsel noticed the deposition of Fried and Fried & Co. and was served with a renewal of the decertification motion (71a).

On November 25, 1975 the Court decertified the class

and ordered Cutner to file an amended complaint within 20 days with class action allegations deleted (88a-91a). While Cutner's counsel was considering whether or not to appeal, counsel inadvertently failed to make a timely filing of such amended complaint, and the clerk of the Court refused to accept such amended complaint for filing after it was served on February 3, 1976 (92a - 93a). On March 2, 1976 plaintiff moved for permission to file the amended complaint. The District Court denied such motion and in a Memorandum and Order dated June 18, 1976, the District Court dismissed the action with prejudice for failure to prosecute and to comply with the court's order requiring an amended complaint (122a - 130).

On July 15, 1976, Cutner filed his notice of appeal from the order denying permission to make a late filing and dismissing the action (6a).

(b) Facts Relevant to the Issues
Presented For Review

The record demonstrates that Cutner's delay in responding to the September 29, 1975 order was excusable, that Cutner's counsel was affirmatively proceeding with pre-trial discovery during the period shortly prior to the service of the amended complaint, that the delay in filing the amended

complaint was inadvertent and did not delay the litigation or prejudice defendants, and that Cutner and his counsel did not willfully seek to delay the litigation.

In response to defendants' July 1975 motion for decertification, Melvyn I. Weiss of Milberg & Weiss submitted an affidavit in opposition to the motion to decertify which explained the delay in the litigation (57a - 59a). Mr. Weiss noted that Cutner, a Philadelphia resident, had originally retained the firm of Harold E. Kohn, P.A. (the "Kohn firm") to institute the action. The Kohn firm determined that proper venue rested in the Southern District of New York, and retained Milberg & Weiss to serve as "local counsel" in the litigation. Prior to service of the motion to decertify, the role of Milberg & Weiss in the litigation was that of local counsel available to the Kohn firm for consultation as requested, and by agreement with Cutner the Kohn firm had primary responsibility for the prosecution of the action. However, during the last few months (during which period the Kohn firm had been analyzing numerous documents produced by defendants) disagreements had developed between Cutner and the Kohn firm concerning certain aspects of the litigation.

As a result of such disagreements, Cutner requested that Milberg & Weiss accept primary responsibility for the continued prosecution of the action, and in August 1975

Milberg & Weiss agreed to accept such responsibility, expressed to the Court its desire to proceed with the litigation, and requested denial of the motion to decertify the class.

Having filed such affidavit, Cutner's counsel awaited the Court's decision. On September 29, 1975 the Court denied defendants' motion, without prejudice to renewing the motion within thirty days upon a showing that during the interim Cutner had failed to take steps to prosecute the action diligently (69a). Unfortunately, Cutner's counsel failed to detect that such a decision had been rendered despite affirmative efforts to determine the status of the motion. In accordance with the firm's standard practice, and anticipating that the decision would be in the form of an opinion, counsel instructed a clerk to make a daily check of the opinion records maintained by the Clerk of the Southern District of New York (70a - 71a). Since, however, the Court's decision was not in the form of an opinion but in the form of a memorandum written on the back of the notice of motion, the Court's decision was not reflected in the opinion book (72a - 76a). Moreover, although a post card informing the parties of the Court's decision was apparently received by defendants, Cutner's counsel received no such notification (71a). In a further administrative mishap, the Court's decision was announced in the October 1, 1975 issue of the New York Law Journal (87a) but the person who reviewed the Law Journal at Milberg & Weiss failed to detect such

announcement. Consequently, Cutner's counsel remained in ignorance of the Court's decision until October 31, 1975, when counsel was served with papers renewing the motion to decertify (71a).

Immediately upon receiving notice of the Court's decision, Cutner served a notice to take depositions of the defendants, which notice was served thirty-two days after the date of the Court's opinion (thus failing to meet the Court's deadline by two days) and precisely thirty days after the announcement appeared in the Law Journal (71a). Counsel for Cutner explained the situation to defendants and requested a withdrawal of the motion. Defendants refused, and counsel for Cutner opposed the motion, submitting affidavits from Melvyn I. Weiss and the clerk who had reviewed the opinion book (70a -76a) which explained the circumstances of counsel's lack of knowledge of the September order and described counsel's prompt action upon learning of the order.

The Court granted the motion to decertify in a Memorandum and Order filed on November 25, 1975 (88a - 91a)*. The Court gave no weight to counsel's explanation which demonstrated that the delay had been inadvertent, was in part due to the lack of an opinion and failure to receive post card notice , was in no way prejudicial to the progress of the action,

*Such opinion has not to appellant's knowledge been reported.

and was certainly not a willful disregard of the Court's order. Ignoring such considerations, the Court found that the two-day delay, following upon the delay which had occurred prior to the original motion to decertify, had occurred "inexcusably" and indicated a "total lack of concern with diligent prosecution of this action" (89a). In consequence, the Court decertified the action as a class action and ordered Cutner to serve and file an amended complaint deleting all class action allegations within twenty days (91a).

Subsequent to such decision, counsel for Cutner evaluated the status of the case and carefully considered whether or not to appeal the decertification. Preoccupied by concern for the overall status of the case, counsel inadvertently allowed the twenty-day period to lapse without filing the amended complaint (93a - 94a). Having decided not to appeal or to seek certification of an appeal from the District Court, counsel for Cutner served an amended complaint stripped of class action allegations on February 3, 1976.* The Clerk of the Court refused to file the amended complaint because the filing was not within the twenty-day limit. Cutner's counsel then sought to obtain consent of defendants to a late filing, a courtesy commonly granted among counsel

*Service of the amended complaint was thus made approximately one and one-half months after the lapsing of the twenty-day period and without any new direction by the Court or motion by defendants.

practicing in this jurisdiction. While defendants refused to consent, they nevertheless served answers to the proposed amended complaint (94a - 109a). Cutner then moved for an order permitting a late filing of the amended complaint (92a). In support of the motion, counsel explained that the failure to meet the deadline had been inadvertent and stressed that defendants had in no way been prejudiced by the timing of the service of such an amended complaint (92a- 93a; 110a - 112a).

Defendants opposed the motion, but even in their opposition papers recognized that plaintiff had recently engaged in pretrial discovery activities, including the taking of the deposition of Fried and Fried & Co. on November 20, 1975 and subsequent requests in November for documents to be reviewed (114a - 115a). Such activities demonstrated that Cutner was in fact continuing to prosecute the litigation and that analyses of documentary material was underway.

In an opinion and order dated June 18, 1976,* the Court denied Cutner's motion for permission to file an amended complaint and dismissed the action with prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure "for failure to prosecute and to comply with the order of this court" (122a - 130a). In its opinion, the Court reviewed its

*Oral argument was held on March 12, 1976, but no minutes of the proceedings were taken.

prior decision to decertify the action as a class action, again failing to recognize that Cutner's two-day delay in responding to the September 29, 1975 order was excusable and did not significantly delay the litigation. The Court characterized the action as one "now pending more than 40 months, which is still in the pleading stages," ignoring the fact that extensive interrogatories had been served by Cutner and answered by defendants, that documents had been produced and were in the process of being reviewed, and that Cutner had deposed Fried and Fried & Co. (125a).

The Court did not question the truth of Cutner's statement that late filing of the amendment involved would in no way be prejudicial to the forward progress of the litigation, but refused to give any weight to such lack of prejudice in its consideration of whether or not dismissal with prejudice was justified:

"Plaintiff asserts, however, that he should, nonetheless, be permitted to file his amended complaint since the defendants have not been prejudiced. Even if true, this assertion is unpersuasive since '[t]he operative condition of the Rule [41(b)] is lack of due diligence on the part of the plaintiff--not a showing by the defendant that it will be prejudiced..." (127a)

The Court stressed its determination to fulfill its duty "to see to the disposition of cases as promptly as the particular circumstances allow" (128a), and stated that its decision

reflected the lack of a satisfactory explanation for delay in filing the amended complaint and the Court's finding of an overall history of delay in the action (128a).

ARGUMENT

POINT I

IMPOSING THE EXTREME SANCTION OF A DISMISSAL WITH PREJUDICE FOR FAILURE TO PROSECUTE WAS IMPROPER IN LIGHT OF RECENT PRE-TRIAL ACTIVITIES BY PLAINTIFF, THE LACK OF ANY WILLFUL DISREGARD OF COURT ORDERS, AND THE LACK OF ANY SUBSTANTIAL OR PREJUDICIAL DELAY TO THE LITIGATION IN CONNECTION WITH PLAINTIFF'S RESPONSE TO THE SEPTEMBER 29 AND NOVEMBER 25, 1975 ORDERS

- (a) Dismissal With Prejudice for Failure To Prosecute Or To Obey a Court Order is a Drastic Sanction to be Applied Only in Extreme Situations

This Court has recognized that "[d]ismissal with prejudice is a harsh remedy to be utilized only in extreme situations" (Theilmann v. Rutland Hospital, Inc., 455 F. 2d 853, 855 (2nd Cir. 1972)), and has carefully reviewed such dismissals to insure that the District Court has properly exercised its discretion. See. e.g., Peterson v. Term Taxi, Inc., 429 F. 2d 888 (2nd Cir. 1970) (reversing a dismissal for failure to proceed with trial); Syracuse Broadcasting Corp. v. Newhouse, 271 F. 2d 910, 914 (2nd Cir. 1959) (reversing a dismissal for failure to prosecute);

Producers Releasing Corp. deCuba v. PRC Pictures, Inc., 176 F.2d 93, 95-96 (2nd Cir. 1949) (dismissal with prejudice reversed, and dismissal without prejudice granted despite District Court's reasonable belief that plaintiff's witness was not incapable of attending deposition).

Judge Waterman has stressed the importance of careful appellate review to assure that the District Court acted within the reasonable exercise of its discretion:

"However, despite the necessity of judge-controlled calendars the appellate courts will not permit the district courts' arbitrary action in the grant of dismissals. As previously stated, dismissal is a drastic remedy and the appellate courts have the duty to examine the exercise of discretion by the lower courts when actions are dismissed." Honorable Sterry R. Waterman, "An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders," 29 F.R.D. 420, 425 (1961).

Other Circuits apply the same caution in reviewing a dismissal with prejudice for failure to prosecute. In Richman v. General Motors Corp., 437 F. 2d 196, 199 (1st Cir. 1971), the Court reversed such a dismissal, stating:

"Under Fed.R.Civ.P. 41(b) as well as under the inherent power of the court, a complaint may be dismissed with prejudice for want of prosecution. Link v. Wabash R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed. 2d 734 (1962). Such dismissal is within the court's sound discretion and will be reversed only upon a showing of an abuse of that discretion. In determining whether there has been such an

abuse all pertinent circumstances must be considered. Dismissal is a harsh sanction which should be resorted to only in extreme cases. The court has a broad panoply of lesser sanctions available to it. Moreover, the power of the court to prevent undue delays must be weighed against the policy of the law favoring the disposition of cases on their merits. Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146, 149 (3d Cir. 1968); Flaksa v. Little River Marine Construction Co., 389 F. 2d 885, 888 (5th Cir.), cert. denied, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed.2d 1387 (1968); Davis v. Operation Amigo, Inc., 378 F. 2d 101, 103 (10th Cir. 1967)...." (emphasis added and footnotes omitted)

See also, e.g., Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F. 2d 1336, 1338-39 (9th Cir. 1970) (reversing a dismissal for failure to follow Court orders).

In Durham v. Florida East Coast Railway Co., 385 F. 2d 366, 368 (5th Cir. 1967), the Fifth Circuit held that the District Court had abused its discretion in refusing to allow plaintiff a dismissal without prejudice, a request made by plaintiff when the District Court refused to allow a request made by plaintiff for a delay of the trial. The Court declared:

"But '[t]he sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion.' Durgin v. Graham, 1967, 5 Cir., 372 F.2d 130, 131. The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff. See Link v. Wabash R. Co., 1962, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed. 2d 734; Ockert v. Union Barge Line Corp., 3 Cir. 1951, 190 F. 2d

303; Joseph v. Norton Co., S.D.N.Y. 1959, 24 F.R.D. 72, 2 Cir., 273 F.2d 65; and other cases noted, 28 U.S.C.A. Rule 41, esp. Note 53...." (emphasis added)

As shown below, the record herein presents less of a basis for dismissal with prejudice than many of the cases in which appellate courts have reversed such a dismissal as an abuse of discretion. Consequently, plaintiff submits that the District Court's dismissal of the action herein was improper.

(b) The Record Provides No Reasonable Basis
For The Extreme Sanction of a Dismissal
With Prejudice

As shown above in the Statement of the Case, Milberg & Weiss received primary responsibility for conduct of the litigation subsequent to defendants' original motion to decertify, took the deposition of Fried and Fried & Co. in late November, and subsequently concerned themselves with review of relevant documents.* It has been recognized that where plaintiff is presently showing reasonable diligence, it is inappropriate to dismiss for earlier delays. See, United States v. Myers, 38 F.R.D. 194, 197 (N.D. Cal. 1964). In light of the recent activities of plaintiff's counsel seeking to move the case forward, prior delays should not provide a basis for dismissal with prejudice.

In its opinion the District Court ignored the fact that Cutner's counsel was affirmatively litigating the case,

*57a - 59a; 114a - 115a.

and concerned itself instead with an aspect of the litigation (the delay in filing the amended complaint) which was not material to the progress of the lawsuit. Affirmance of such an order would thus have the general effect of encouraging defendants to seek dismissals when delays having little impact on the litigation have occurred in cases which are otherwise being vigorously litigated.

As shown above, Cutner's delay in responding to the Court's September 29, 1975 memorandum was excusable in that it was occasioned by an administrative failure to learn of such memorandum and was rectified by a notice of depositions served two days after the thirty-day deadline set by the Court. The failure to amend the complaint within twenty days of the Court's order decertifying the action was inadvertent and did not represent any willful or contumacious effort to delay the litigation since the amendment required by the Court did not affect the substance of the litigation but simply deleted allegations which all parties knew had become surplusage.* The Court in its opinion recognized the lack of any prejudice to defendants from a late filing of the amended complaint. (127a)

Cutner submits that the District Court failed to give due consideration to factors which are properly reviewed in deciding whether to dismiss with prejudice for lack of prosecution. As shown below, such factors typically include,

*70a - 76a; 93a - 94a.

inter alia, extent and deliberateness of delay in the litigation; degree of willfulness of plaintiff's failure to comply with Court orders; extent of prejudice to defendants or to the litigation from the delay; and consistency of a dismissal with the goal of obtaining substantial justice for litigants.

(i) The Record Herein Does Not Show Substantial Delay, Deliberate Use of Dilatory Tactics, or Willful Disregard of Court Orders

The record herein does not evidence any material delay in the litigation subsequent to present counsel's taking charge of the litigation,* and the courts have often refused to dismiss actions with prejudice in situations where substantially more lengthy delays had occurred. E.g., Lyford v. Carter, 274 F. 2d 815, 816 (2nd Cir. 1960) (two-year delay); Glo Co. v. Murchison & Co., 397 F. 2d 928, 930 (3rd Cir.), cert denied, 393 U.S. 939 (1968) (dismissal with prejudice reversed despite the fact that five distinct periods had occurred when plaintiff had taken no action for over a year and four warnings that the case might be dismissed had been issued to plaintiff); Sykes v. United States, 290 F. 2d 555, 557 (9th Cir. 1961) (almost seven months of

*As described above in the Statement of the Case, counsel had been proceeding with pre-trial discovery activities despite the delay in serving the amended complaint.

inactivity did not justify dismissal with prejudice when there was no evidence of intent to abandon the action). In cases where this Court has sustained dismissal with prejudice, substantially longer delays than the delays herein have typically occurred. E.g., Theilmann v. Rutland Hospital, Inc., supra (two years of almost total inactivity); West v. Gilbert, 361 F. 2d 314, 316 (2nd Cir.), cert. denied, 385 U.S. 919 (1966) (one year and four months delay before even moving to vacate dismissal); Ohliger v. United States, 308 F. 2d 667 (2nd Cir. 1962) (complaint dismissed after what appears to have been two years of inactivity, and plaintiff waited an additional four months to move to reinstate action).

The Court below relied heavily on Theodoropoulos v. Thompson-Starrett Co., 418 F. 2d 350 (2nd Cir. 1969), cert denied, 398 U.S. 905 (1970). In that case the Court at a pretrial conference had ordered a note of issue to be filed within one hundred fifty days, expressly warning that the action might otherwise be dismissed sua sponte. Subsequently, plaintiff obtained a ninety day extension but failed to file a note of issue on or before the expiration date. The District Court then dismissed for lack of prosecution but without prejudice. Six months later plaintiff's lawyers moved for reinstatement and the Court granted the motion with an order that a note of issue be filed within

fifteen days. The deadline passed without such filing and the Court dismissed with prejudice. On appeal, this Court affirmed the District Court's exercise of discretion, stressing that plaintiff had paid "no attention to the status of the case until six months after the time for filing expired" and had failed to make any inquiry with respect to the disposition of a motion to restore the case to the calendar which plaintiff made subsequent to discovery of the initial dismissal without prejudice. This Court also emphasized that plaintiff had been on notice from the initial order of the danger that the District Court might dismiss for failure to meet the deadline. Id. at 354.

While this Court stated in Theodoropoulos that the dismissal was proper "despite the absence of a showing of specific prejudice to the defendants" (Id. at 353), the impact of the failures to comply with the Court's orders in that case went to the heart of the forward progress of the action*and were thus prejudicial in the sense that they contributed to a very substantial delay in the litigation. In the present action a delay in filing a pleading which simply deleted class action allegations subsequent to a decertification did not delay the progress of the action. Moreover, plaintiffs in Theodoropoulos failed to determine the status of the case for a period of six months after expiration of a deadline which the Court had expressly stated might result in dismissal, as opposed to a two-day

*An order requiring the filing of a note of issue is clearly critical in moving the case forward to trial.

delay in the present action with respect to meeting the deadline in the September 29 Order and a delay of a month and one-half in filing an amended complaint which had absolutely no impact on the progress of the litigation. Finally, the plaintiffs in Theodoropoulos made no effort to determine the status of the case for six months, whereas with respect to the September 29, 1975 order, herein, plaintiff's counsel sent a clerk daily to review the opinion sheets.

Nor does the record reflect any willful or contumacious effort by plaintiff to ignore the District Court or to delay the litigation. The Court below relied on Link v. Wabash Railroad Co., 370 U.S. 626 (1962), where the Supreme Court upheld the power of a district judge to dismiss sua sponte for lack of prosecution. Unlike the instant action, the facts in Link involved a willful failure by plaintiff to appear at a pre-trial conference in a context where plaintiff's counsel telephoned the court the morning of the pre-trial conference and simply stated that he was too busy to attend and would have to appear some other time. The Supreme Court also noted that the record supported a conclusion "that petitioner had been deliberately proceeding in dilatory fashion." 370 U.S. at 633.

Many other decisions reflect similar considerations. In Pond v. Braniff Airways, Inc., 453 F. 2d 347, 349 (5th Cir. 1972), the Court reversed the District Court's dismissal with prejudice for failure to submit a pretrial order and a failure to submit jury requests when such failures constituted "inadvertence

by counsel" and "involved no willful contempt". In Schwarz v. United States, 384 F. 2d 833 (2nd Cir. 1967), this Court affirmed a dismissal with prejudice in a context where counsel totally failed to take any steps to prepare for trial (such as taking depositions or serving interrogatories) during a five-year period, and the trial judge correctly found that counsel for plaintiff never had any intention of trying the case on the appointed date. Id. at 835. Despite such willful failure by plaintiff to observe its responsibilities, this Court took the opportunity to suggest that even in cases of "inexcusable neglect" the district court consider other alternatives rather than impose "the drastic remedy of dismissal." Id. at 836. See also, e.g., International Association of Heat and Frost Insulators and Asbestos Workers v. Leona Lee Insulation and Specialties, Inc., 516 F. 2d 504, 505 (5th Cir. 1975) (dismissal reversed where facts "lack any suggestion of contumacious indifference to the Court of the kind we generally regard as requisite to the use of this severe sanction"); Bush v. United States Postal Service, 496 F. 2d 42, 44 (4th Cir. 1974) (reversing dismissal on the merits where the record did not "depict a history of deliberate delay").

Other cases cited by the Court below in support of its opinion also support the conclusion that the drastic remedy of dismissal without prejudice is normally employed where plaintiffs or their attorneys were contumaciously seeking

to delay and where far more substantial delay actually occurred. In Theilmann v. Rutland Hospital, Inc., supra, there was a complete failure to be ready for trial after two years in which the main activity of the plaintiff seemed to have been a search for new lawyers. Plaintiff finally retained an attorney who promptly went on vacation knowing that the case was about to be called for trial and who failed to appear for trial even after the jury had been called. In such aggravated circumstances, this Court refused to overturn the District Court's dismissal with prejudice. This Court gave special emphasis to plaintiff's failures to appear after the jury had been drawn and emphasized that such failures might well distinguish the case from situations where failure to dismiss would not mean that the time of jurors had been wasted and the precious right to a jury trial disparaged. 455 F. 2d at 856.

The Court below also relied on Klein v. Spear, Leeds & Kellogg, 65 F.R.D. 406, 410 (S.D.N.Y. 1974). In Klein, the District Court dismissed plaintiff's Second Cause of Action for failure to prosecute. In its order filed December 2, 1974, the Court in Klein found that plaintiff had totally failed to prosecute such cause of action ever since June 1, 1973, and had further impeded progress by failing to appear for a deposition, a wrongful act which resulted in defendants' failure to submit to examination. Such findings contrast

sharply with the situation herein, where subsequent to present counsel's assumption of responsibility for the action, the Court points only to a two-day delay in responding to its September 29, 1975 memorandum and a failure to file an amended complaint which had absolutely no impact on the progress of the action.

(ii) The District Court Improperly Failed
to Consider Lack of Prejudice
a Relevant Factor

In refusing to consider lack of prejudice a relevant factor, the District Court relied on language of this Court in Messenger v. United States, 231 F. 2d 328, 331 (2nd Cir. 1956), as cited in Klein v. Spear, supra, to the effect that "the operative condition of the Rule [41(b)] is lack of due diligence on the part of the plaintiff - not a showing by the defendant that it will be prejudiced...." (127a) However, the District Court in the present case applied such language to a situation wholly unlike the circumstances which originally gave rise to such language by this Court. In Messenger, the District Court had dismissed a claim against the United States under Rule 41(b) in light of the fact that plaintiff had failed for six years to effect service of the summons and complaint in compliance with Rule 4(d)(4) of the Federal Rules of Civil Procedure.

The United States had never appeared or answered and had participated in no proceedings. This Court held that the District Court was warranted in dismissing for failure to prosecute. However, this Court stated that in less extreme cases it would be appropriate to take the factor of the extent of prejudice into account:

"For some six years there has been a complete lack of any prosecutory effort; not even service of the action has been accomplished. Under Rule 41(b), a motion to dismiss may be granted for lack of reasonable diligence in prosecuting. [Citations Omitted]. The operative condition of the Rule is lack of due diligence on the part of the plaintiff - not a showing by the defendant that it will be prejudiced by denial of its motion. Hicks v. Bekins Moving & Storage Co., supra. It may well be that the latter factor may be considered by the court, especially in cases of moderate or excusable neglect, in the formulation of its discretionary ruling. But under the circumstances of this case it would have been a gross abuse of discretion to make a finding of excusable neglect nor would such a finding be of avail to plaintiff in the absence of service upon the Attorney General." 231 F. 2d at 330-31 (emphasis added)

In light of the difference between the record herein and the six year lack of prosecution in Messenger, and in light of this Court's recognition in Messenger that the degree of prejudice is an appropriate consideration "in cases of moderate or excusable neglect," the Court below should not have refused to consider lack of prejudice a relevant consideration.

Consistent with the above analysis, many Circuit

Courts have included lack of prejudice to defendants as one consideration leading to their decision to reverse the District Court's dismissal for lack of prosecution. E.g., Reizakis v. Loy, 490 F. 2d 1132, 1135-36 (4th Cir. 1974); Alamance Industries, Inc. v. Filene's, 291 F. 2d 142, 145-46 (1st Cir.), cert denied, 368 U.S. 831 (1961); Sykes v. United States, 290 F. 2d 555, 557 (9th Cir. 1961). See also, e.g., United States v. Welch, 151 F. Supp. 899, 901 (S.D.N.Y. 1957); United States v. Myers, 38 F.R.D. 194, 197 (N.D. Cal. 1964); Livingstone v. Hobby, 127 F. Supp. 463, 464 (E.D. Pa. 1954).

(iii) The District Court Improperly
Emphasized Considerations of
Calendar Control to the Exclusion
of Considerations Regarding the Need
to Provide Substantial Justice to Litigants

The Court below placed heavy emphasis in its opinion on the need to reduce calendar congestion (128a-129a). However, this Court has stressed that calendar control is not an end in itself and that a dismissal with prejudice will be reversed if the effect of such dismissal is to deny litigants substantial justice. Thus in Peterson v. Term Taxi, Inc., supra, this Court reversed a dismissal for failure to proceed with trial despite this Court's recognition that plaintiff and his attorneys had evidenced "a failure of good judgment", that plaintiff's attorneys

were "less than diligent in their communication among themselves," and that the conduct of plaintiff and his attorneys "was an affront to the court." 429 F. 2d at 891. Nevertheless, this Court held that dismissal of the action for the purpose of encouraging litigants to comply with court orders and to keep calendars current was an abuse of the trial court's discretion:

"Nevertheless, imposition of the most 'drastic remedy' available to the court was not justified by these circumstances. We recognize that the trial judge must have the power to control his docket, and that adjournments, postponements and the rescheduling of cases contribute to the serious calendar problem existing in the Southern District of New York. 'Since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal.' *Davis v. United Fruit Co.*, 402 F. 2d 328, 331-332 (2d Cir. 1968); *Winston v. Prudential Lines, Inc.*, 415 F. 2d 619, 620 (2d Cir. 1969). Nevertheless, as we said in *Davis*, supra, 'a court must not let its zeal for a tidy calendar overcome its duty to do justice.' 402 F. 2d at 331.

We reiterate that 'the purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired.' *Winston*, supra, 415 F. 2d at 621. The trial court's refusal here to reopen a case whose dismissal rested on plaintiff's poor judgment does not comport with those ends, and justice has been impaired by such close inflexible attention to the docket". Id. at 891. (emphasis added)

See also, e.g., *Alamance Industries, Inc. v. Filene's*, supra, 291 F. 2d at 145-46 and fn. 4, p. 146.

Plaintiff submits that, on the record before this Court, substantial justice has not been done and Cutner has been denied his day in court on a matter as to which he has sustained substantial damages. The dismissal with prejudice was improper and should be reversed.

POINT II

DISMISSAL WITH PREJUDICE SOLELY FOR
THE FAILURE TO DELETE CLASS ACTION
ALLEGATIONS FROM THE COMPLAINT WITHIN
TWENTY DAYS WOULD BE IMPROPER

While the Court's opinion states that the action was dismissed with prejudice "for failure to prosecute and to comply with the order of this court" (129a), the opinion stresses that the decision was heavily influenced by the Court's view that plaintiff had "been guilty of protracted delay occasioned only by his own inexcusable neglect." (127a). Consequently, the Court might well have granted the motion to file the amended complaint had it not also believed that the history of the case demonstrated an overall failure to prosecute. It would thus be appropriate for this Court to remand the action for further proceedings on the ground that the dismissal for lack of prosecution was improper and that the opinion below does not clearly hold that the mere failure to make a timely filing of the amended complaint was an independent basis for dismissal with prejudice. See,

e.g., Syracuse Broadcasting Corp. v. Newhouse, 271 F. 2d 910, 914 (2nd Cir. 1959).

In the event that this Court does consider the question whether failure to file the amended complaint within the twenty-day deadline is an adequate independent ground for a dismissal of the action with prejudice, Cutner submits that no form of amendment could be less significant to the merits or the progress of an action than the amendment required by the District Court's order. The class action allegations had already been deleted from the law suit by the District Court's order decertifying the action. Consequently, the only function of the required amendment was to delete allegations which all parties knew were surplusage.

In cases cited by defendants in their brief below in opposition to the motion for permission to make a late filing, the amendments involved went to the heart of the litigation, and the actions involved could not effectively proceed until the pleading had been amended. E.g., John Birch Society v. National Broadcasting Co., 377 F. 2d 194, 198-99 (2nd Cir. 1967) (failure to meet a court imposed deadline for curing defective allegations as to subject matter jurisdiction)*: Agnew v. Moody, 330 F. 2d 868, 870 (9th Cir. 1964), cert.

* It should be noted that this Court in John Birch Society stressed that the proposed amendment would not have cured the defective pleading. Id. at 199. Moreover, unlike the present situation, the dismissal of the complaint for lack of subject matter jurisdiction was without prejudice under Rule 41(b).

denied, 379 U.S. 867 (1964) (failure to provide a succinct statement of the claim so that defendants could answer)*; Thompson v. Johnson, 253 F. 2d 43 (D.C. Cir. 1958) (failure to file a sufficiently specific complaint).

It should also be noted that in such cases, plaintiffs' attorneys had been clearly put on notice of the importance of promptly filing the amended complaint because the complaint had already been dismissed, subject to reinstatement if an amendment were timely filed. In the present situation, the complaint was not dismissed in the Court's November 25, 1975 order and the Court directed only that the complaint be revised to conform to the result already effected by the decertification of the class.

The cases cited in POINT I above demonstrate that failure to comply with a court order should not result in dismissal with prejudice in the absence of dilatory tactics, a willful failure to comply, substantial delay in the litigation, or prejudice to defendants or the Court. Consequently, the delay in filing the amended complaint should not be held in and of itself to have been a sufficiently serious delinquency to justify the extreme sanction of a dismissal with prejudice.

* In Agnew the facts before the Court indicated very strongly the non-meritorious nature of the claims, in that plaintiff sued public officers who had arrested him in connection with a traffic violation for which plaintiff was subsequently tried by a jury and convicted, the conviction being upheld on appeal.

CONCLUSION

For the reasons given above, the order of June 18, 1976 dismissing the action with prejudice should be reversed and the action should be remanded to the District Court for further proceedings.

Dated: New York, New York
September 9, 1976

Respectfully submitted,

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL SYLVESTER, being duly sworn, deposes
and says:

That deponent is not a party to the action; is
over the age of 18 years and resides at 621 Garner Place,
East Meadow, New York.

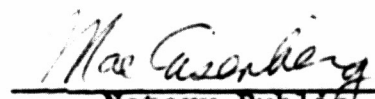
That on the 9th day of September, 1976, deponent
served the within Brief of Plaintiff-Appellant Clyde C.
Cutner on the attorneys listed below by leaving two true
copies thereof with the receptionist at each of said firms:

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MICHAEL SYLVESTER

Sworn to before me this
9th day of September, 1976


Notary Public
MAE EISENBERG
Notary Public, State of New York
No. 30-4606174 Qual. in Nassau Co.
Cert. Filed in New York County
Commission Expires March 30, 1977